

NATIONAL MEDIATION BOARD

ANNUAL PERFORMANCE
AND ACCOUNTABILITY
REPORT FY2012

REPRESENTATION & PEBS

MARY JOHNSON,
General Counsel

REPRESENTATION & PEBS

37

R
&
P

The Office of Legal Affairs manages representation issues; conducts elections for the purpose of determining collective-bargaining representatives in the airline and railroad industries; and oversees post-mediation activities that lead or may lead to the establishment of Emergency Boards by the President of the United States (PEBs). The General Counsel also serves as legal counsel for the NMB.

NOTE A complete list of acronyms is given at the back of this Annual Report.

REPRESENTATION OVERVIEW

Under the Railway Labor Act (RLA), employees in the airline and railroad industries have the right to select a labor organization or individual to represent them for collective bargaining. Employees may also decline representation. An RLA representational unit is “craft or class,” which consists of the overall grouping of employees performing particular types of related duties and functions. The selection of a collective bargaining representative is accomplished on a system-wide basis, which includes all employees in the craft or class anywhere the carrier operates in the United States. Due to this requirement and the employment patterns in the airline and railroad industries, the Agency’s representation cases frequently involve numerous operating stations across the nation. [An application for a representation investigation may be obtained from the Agency’s web site at www.nmb.gov.]

If a showing-of-interest requirement is met, the NMB continues the investigation, usually with a secret Telephone/Internet election. Only such employees that are found to be eligible to vote by the NMB are permitted to participate in such election. The NMB is responsible for determining RLA jurisdiction, carrier status in mergers, and for ensuring that the requirements for a fair election process have been maintained without “interference, influence or coercion” by the carrier. If the employees vote to be represented, the NMB issues a certification of that result which commences the carrier’s statutory duty to bargain with the certified representative.

In many instances, labor and management raise substantial issues relating to the composition of the electorate, jurisdictional challenges, allegations of election interference, and other complex matters which require careful investigations and ruling by the NMB.

Representation disputes involving large numbers of employees generally are more publicly visible than cases involving a small number of employees. However, all cases require and receive neutral and professional investigations by the Agency. The case summaries that follow are examples of the varied representation matters which were investigated by the NMB during FY 2012.

REPRESENTATION HIGHLIGHTS

In May 2012, the NMB published a notice of proposed rulemaking (NPRM) in the Federal Register and on the NMB website to amend existing rules for handling representation disputes, incorporating statutory language added to or amending the RLA by the Federal Aviation Administration Modernization and Reform Act of 2012. The NPRM proposed changes to the existing regulations pertaining to run-off elections, showing of interest for representation elections, and the NMB's rulemaking proceedings. The Board also held a public hearing on June 19, 2012. The Board accepted comments on the proposed rule changes until August 6, 2012.

On June 15, 2012, the Board issued a policy stating "Any hyperlinks posted at any website other than the NMB's website are strictly prohibited. To assure that no illegal hyperlinks are used, effective June 18, 2012, the Board's election administrator prohibited access to the voting website by any employee who has originated from an unauthorized hyperlink." The Board will allow participants to "continue to post hyperlinks to the Board's website, www.nmb.gov, and may provide the text address of the voting website, www.ballotpoint.com/NMB, if they wish to direct employees where to vote in an NMB election."

The NMB's Office of Legal Affairs (OLA) continues to operate at a high level of quality and efficiency. As a review of customer service and performance standards will attest, the Agency's Representation program consistently achieves its performance goals, delivering outstanding services to the parties and the public.

The OLA staff closed 37 cases and docketed 42 cases during the year. With the Agency resources requested for 2013 and 2014, it is estimated that 53-55 representation cases will be investigated and resolved in each year.

UNITED AIR LINES / IAM

On September 20, 2011, the International Association of Machinists filed an application alleging a representation dispute involving the craft or class of Passenger Service Employees of United Air Lines, MileagePlus, Inc., Continental Micronesia, and Continental Airlines (Carrier). On December 12, 2011, the Board issued a determination finding a single transportation system at the Carrier for the craft or class of Passenger Service Employees. *United Air Lines / Continental Airlines, Inc.*, 39 NMB 229 (2011). At the time the application was filed, the IAM represented the Passenger Service Employees at United Air Lines (United) and Mileage Plus, Inc. (MPI) and the International Brotherhood of Teamsters (IBT) represented the Passenger Service Employees at Continental Micronesia (CMI). The Passenger Service Employees at Continental Airlines (Continental) were unrepresented.

The Board noted that for 35 years, it has included employees who perform Fleet Service duties in the Passenger Service craft or class and that the Investigators erred by not taking prior Board determinations into consideration when determining the eligibility of cross-utilized Customer Service Representatives (CSRs) employees. The Board stated that the Investigators' conclusion and the Carrier's contention that the Board's determination of a single transportation system compelled the Board to disregard the historic craft or class definitions was unpersuasive, especially without evidence that job duties changed due to the merger process. The Board stated that Continental and United work groups had not yet been integrated and the Carrier did not identify any changes in job duties resulting from the merger process. The Board also noted that although it was possible that changes could occur following the completion of the merger of United and Continental, the Board does not make determinations based on future changes. Finally, the Board stated that without evidence that the work groups had been integrated, the job classifications of employees at pre-merger Continental Airlines have no bearing of a determination of the appropriate craft or class for these employees.

The Board found that the Investigators correctly ruled that Station Operations Representatives (SORS) performed both Fleet Service and Passenger Service functions. However, the Board stated that the Investigators erred by relying on cases involving other carriers, thereby ignoring the fact that on United, these employees were historically considered part of the Passenger Service craft or class. The Board found that all SORS, regardless of their current job assignment, continued to perform passenger service functions during irregular operations, continued to share the same community of interest with Passenger Service Employees as they did in 1998, and continued to bid their current assignments from the same seniority list. The Board did not find any evidence that SORS job functions had changed as the result of the merger.

The Board stated that the Investigators correctly found that Air Freight Representatives (AFRs) provided customer service to cargo customers in connection with cargo service. However, the Investigators erred by relying on cases involving other carriers, thereby ignoring the fact that on United, these employees were historically considered part of the Passenger Service craft or class and "customer contact" included contact with passengers or cargo customers. Further, the Board found that the furloughed AFRs continued to share the same community of interest with Passenger Service Employees as they had for the past 35 years and remained on the seniority list. Finally, the Board did not find any evidence that AFR job functions had changed as a result of the merger.

The Board also noted that the Investigators erred in relying on preponderance evidence to determine the eligibility of the cross-utilized CSRs. The Board found that the unique circumstances that prompted it to include these cross-utilized employees in the Passenger Service Employees craft or class 35 years ago remained unchanged. The Board stated that the evidence presented

by both the IAM and the Carrier demonstrated the fluidity of the job duties of the CSRs. The Board also found that the “snapshot” required by the preponderance test did not provide an accurate representation of the duties of these employees and was, therefore, not the appropriate test for making this craft or class determination under the unique circumstances presented in this case.

Finally, the Board found that at line stations, the present status and interest of the cross-utilized employees was illustrated by their work-related community of interest with the rest of the Passenger Service Employees craft or class at United. Additionally, the evidence provided by the IAM demonstrated that these employees did not have regular contact with Fleet Service employees; did not share break rooms or supervisors with the Fleet Service employees; and did not share work hours or training classes with the Fleet Service employees. The Board found that these employees did, however, share all of these with other employees in the Passenger Service craft or class; were on the same seniority list as the Passenger Service employees; and bid for vacation from that list.

The Board stated that the mere fact that a merger had occurred could not be the basis for finding these employees ineligible and denying them their right to vote. The Board also stated that in view of the unusual circumstances of this case, the Board’s decision was narrowly focused on finding, eligible, those employees who have historically voted in the Passenger Service Employees craft or class at United.

Therefore, the Board overruled the Investigators’ February 10, 2012 ruling and determined that the 706 CSRs, 152 furloughed AFRs and 117 SORs were eligible to vote in the Passenger Service election.

UNITED AIR LINES, INC. IAM / AFA

On January 18, 2011, the Association of Flight Attendants – CWA (AFA) filed an application requesting the NMB to investigate whether United Air Lines, Inc. (United), Continental Airlines, Inc. (Continental) and Continental Micronesia (CMI) were operating as a single transportation system for the craft or class of Flight Attendants. At the time the application was filed, the Flight Attendants on United were represented by AFA and Flight Attendants at Continental and CMI were represented by the International Association of Machinists and Aerospace Workers (IAM). The Board found United and Continental were a single transportation system known as United for the craft or class of Flight Attendants and proceeded to address the representation consequences. *United Air Lines, Inc. / Continental Airlines, Inc.*, 38 NMB 124 (2011). On April 26, 2011, the Board authorized an election in this matter with IAM and AFA on the Ballot. The Board scheduled the tally for June 29, 2011.

The June 30, 2011 Report of Election results reflected that a majority of votes were cast for AFA. The Board issued a Certification of AFA as the representative for purposes of the RLA of the craft or class of Flight Attendants. *United Air Lines, Inc. / Continental Airlines, Inc.*, 38 NMB 248 (2011).

On July 11, 2011, pursuant to the Manual Section 17.0, IAM filed allegations of election interference on the part of AFA and the Carrier. On January 9, 2012, the Board notified the participants that further investigation was necessary to determine whether the laboratory conditions had been tainted.

From February through April 2012 NMB Investigators conducted on-site investigations and interviewed management officials, randomly selected employees and AFA and IAM witnesses.

UNITED AIR LINES, INC. / IBT

The Board found that the laboratory conditions in the election involving United's Flight Attendants were not tainted and that the Carrier did not interfere with the election. However, the investigation further established that certain actions by the AFA raised concerns about the confidentiality of the voting process. The Board stated that while AFA's actions did not rise to the level of interference, coercion or influence, the Board found that these actions jeopardized the secrecy of the NMB's ballot process. Accordingly, the Board shortened its normal bar period set forth in Section 1206.4(a) of the Board's Rules and stated that the bar period in this case would expire 18 months after the date of AFA's certification.

On January 19, 2011, the International Association of Machinists and Aerospace Workers filed an application alleging a representation dispute involving the craft or class of Fleet Service Employees at the merging carriers of United, Continental, and CMI (United). Fleet Service Employees at United were represented by IAM and Fleet Service Employees at Continental and CMI were represented by the International Brotherhood of Teamsters (IBT). The Board issued its single carrier determination on April 28, 2011. *United Air Lines, Inc. / Continental Airlines, Inc.*, 38 NMB 185 (2011). The Board authorized an election with a tally scheduled for August 12, 2011 with IAM and IBT on the ballot. The Report of Election Results reflected that a majority of votes were cast for IAM. *United Air Lines, Inc. / Continental Airlines, Inc.*, 38 NMB 285 (2011).

On August 22, 2011, pursuant to Manual Section 17.0, IBT filed allegations of election interference against United and IAM, seeking a re-run election. United, IAM and the IBT filed responses. On January 18, 2012, the Board notified the participants that an investigation was necessary to determine whether laboratory conditions had been tainted. Board Investigators conducted on-site interviews and investigations at Chicago O'Hare International Airport (ORD) and Denver International Airport (DEN).

The Board found that there was some confusion over what activities were permitted, despite the instructions received by management. Management was instructed to remain neutral and generally did so. The Board stated that as the incumbent organization at ORD and DEN, IAM had more access to employees but that greater access was not sufficient to find interference by the Carrier. Additionally, isolated incidents of a carrier allowing the incumbent union access to property or equipment for activities other than official business during a campaign does not indicate a pattern of support.

The Board found that posting a hyperlink to the voting website might constitute interference and while that violation of Board policy did not rise to the level of compromising the voting process in this case, it had the potential to destroy the secrecy of the Board's election process. Although there was no evidence that IAM intended to use the hyperlink to track votes, the hyperlink's inclusion on IAM's website was a violation of Board policy. The IAM's actions did not justify setting aside the election but in view of the circumstances, the Board shortened the normal bar period on IAM's certification as set forth in Section 1206.4(a) of the Board's Rules and stated that the bar period would expire 18 months from the August 12, 2011 certification.

NATIONAL MEDIATION BOARD

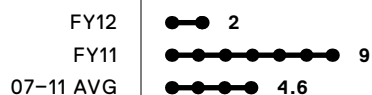
ANNUAL PERFORMANCE
AND ACCOUNTABILITY
REPORT FY2012

REPRESENTATION CASES

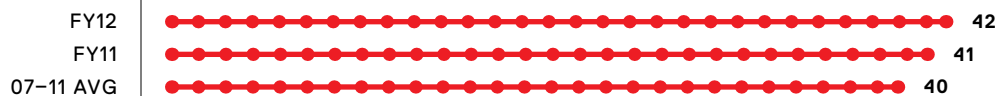
REPRESENTATION & PEBS

43

START-PENDING



NEW



SUM



CLOSED



END-PENDING

